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JOHN T. FEY,

IN THE

Supreme Court of the United States

October Term, 1956
No. 852

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

PETITION FOR REHEARING.

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To the Honorable Earl Warren, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Adrian Scott requests this Court to grant a rehearing of its order filed April 22, 1957, denying his Petition for a Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Ninth Circuit in the above entitled case as prayed for in the petition filed March 22, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I.

The So-called "Morals Clause" of the Employment Contract Has Been Converted Into an Instrument of Repression Against Political Minorities. Its Enforcement in a Diversity Case Against Politically Undesirable Employees Is a Violation of the Fourteenth Amendment.

The decisions of this Court on May 6, 1957, in *Schware v. New Mexico,* Oct. Term, 1956, No. 92, and *Konigsberg v. State Bar of California,* Oct. Term, 1956, No. 5, forbid the use of the requirement of "good moral character" as a device for political discrimination among applicants for admission to the bar. Those decisions are intervening events which illuminate an aspect of this case not heretofore presented.

Until the series of cases which include the present one, the "morals clause" in employment contracts had never been used to discriminate between employees on the grounds of political affiliation or other political conduct. The clause came into being after the "Fatty" Arbuckle incident in 1921 to restrict widely publicized sexual and other moral deviations. (Dr. Ruth A. Inglis, "Freedom of the Movies," Univ. of Chicago Press 1947, p. 97.)

After the 1947 hearings of the Congressional Committee on UnAmerican Activities, the "morals clause" for the first time was sought to be used by employers to make Communism, left-wingers, and "joiners" unemployable. The intervening years tell the story of firings and black-listing of hundreds of persons who were found to be out of grace with current political orthodoxy.

These economic sanctions imposed by employers were used for spreading a repressive influence in a popular art form, one of the most effective current means of communication. The artist-employee who was a political dissenter now finds himself unable to enforce his contract rights, and thus suffers discrimination in contract with other employees.

A serious Constitutional question arises from this kind of enforcement by the courts of the "morals clause" on a basis of political affiliation. A United States District Court in a diversity case is subject to the same restrictions as is a state court.

It is submitted that the action of the United States courts in the present case violates the Fourteenth Amendment, or in any event, the Fifth Amendment.

To make the point explicit:

1. Scott had a valid contract; he sought to enforce it by action in the state court. [R. 12.] It was removed to the United States District Court.

2. A jury determined on interrogatories submitted by the parties that Scott's failure to disclose his political affiliations had *not* brought him into public disrepute, had *not* offended the community, had *not* injured his employer and that Scott had *not* violated his contract.

3. The basis of Scott's refusal to answer the Committee's political affiliation questions, the First Amendment [R. 334], has now been held by this Court to be non-frivolous. (*Konigsberg, supra,* note 30.)

The District Court set aside the verdict; and on retrial stated it was bound by the Court of Appeals in

Lardner and *Cole* (both diversity cases on similar contracts) and gave judgment refusing to enforce Scott's contract. The underlying ground was the plaintiff's presumed political affiliation.

By the Court's refusal to enforce Scott's contract, under the circumstances, the Court has violated the Fourteenth Amendment. (*Shelley v. Kramer,* 334 U. S. 1; *Commonwealth of Pennsylvania v. Board of Directors of City Trusts,* Oct. Term, 1956, No. 769, decided *per curiam* April 30, 1957.)

II.

By Interposing Its Own Determination of a Question of Fact on the Ground That Only One Conclusion Could Be Drawn From the Evidence, the Court of Appeals Has Created a Conclusive Presumption in the Face of Constitutional Restrictions Has Exercised a Legislative Power, and Its Conduct Must Be Subject to the Same Restrictions Which Govern the Legislature; as Such the Decision Violates Constitutional Restrictions.

It should be remembered that the United States District Court did not purport to determine by itself the crucial question of whether Scott's conduct had brought him into public contempt. It expressly adopted the determination made by the Court of Appeals as questions of law in the *Lardner* and *Cole* cases.[1] *Scott* and *Lardner* were both tried on the theory, accepted by the parties and the trial court, that the question of whether the respective plaintiffs had brought themselves into public contempt

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[1]Had the issue been treated as one of *fact,* the trial court would not have adopted a finding made in another case. Only on the theory that the Court of Appeals had announced a rule of *law* could the District Court have applied it to the instant case.

was one of fact; and there can be no doubt but that the effect of Scott's conduct (and that of the other plaintiffs) on the public was, and could only be, a question of fact.

The Court of Appeals in *Scott* and *Lardner* held that there was no issue of fact to present to the jury on the question of breach, because it conclusively assumed that the conduct of the plaintiffs in each case brought him into public contempt. The result was that an employee holding a valuable right under a long-term employment contract which contained a morals clause lost his rights as a matter of law.

In so doing, it is submitted, the Court of Appeals exercised a *legislative*, not a judicial, power. The exercise of such power was not only beyond its capacity, but would in any event be prohibited by the Constitution of the State of California and the Constitution of the United States.

Merely designating the issue as one of law could not change its character. It remained a question of fact. The creation of a conclusive presumption of fact, which is tantamount to making the issue a question of law in the face of a contrary verdict of a jury, is void unless the conclusion is the only one possible under the circumstances. (*Russell v. Post*, 138 U. S. 425, 426.)

Even a former Communist, or a witness who refuses to disclose his political ties, is *not* necessarily, and as a a *matter of law*, held in public contempt or guilty of moral turpitude. (*Konigsberg v. State Bar, supra.*) This entire problem is one of the most heated and controversial questions of our day. For a court to declare by *fiat*, and in the face of a jury verdict, for one side or the other is to throw the weight of the government's authority into an area in which only free discussion should be permitted to operate.

Apart from underlying principles, the decision inflicted substantial injury to petitioner. The decision deprived the petitioner of valuable and substantial constitutional rights; it deprived him of his contract rights without due process of law; by determining he was guilty of moral turpitude as a matter of law, it deprived him of his right to work in his career or in any position of trust.

III.

The Decision Below Conflicts With This Court's Subsequent Decision in Schware v. New Mexico That a Determination of Morality Depends Upon a Consideration of the Nature of the Offense Committed.

The Court of Appeals in *Lardner* (App. B. p. 9 of Pet. for Cert. in this case) held that the employee's conviction of the crime of contempt of Congress *ipso facto* settled the issue of breach of contract in favor of the employer. No consideration whatsoever was given by the Court of Appeals to the nature of the offense.

In *Schware,* at footnote 11, this Court has now ruled that:

> "In determining whether a person's character is good, the nature of the offense which he has committed must be taken into account."

Schware was reversed because the New Mexico court drew "an unwarranted legal conclusion from petitioner's early Communist affiliation." (Concurring opinion of Mr. Justice Frankfurter.)

It is respectfully submitted that in this case, the Court of Appeals drew an even more unwarranted conclusion

when it held, as a mater of law and contrary to a jury's verdict, that Scott's refusal to answer political affiliation questions was an act of moral turpitude which breached his employment contract. In *Konigsberg, supra*, at note 21, this Court commented that nothing "appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties with bad moral character." At note 31 of *Konigsberg* this Court said:

> "On the record before us, it is our judgment that the inferences of bad moral character which the committee attempted to draw from Konigsberg's *refusal to answer questions about his political affiliations* and opinions are unwarranted." (Emphasis supplied.)

The instant case also presents a "serious question of elemental fairness" which this court in *Konigsberg* (text at footnote 14) said would have arisen if the State Bar had excluded the applicant "simply because he failed to answer questions *without first explicitly warning him that he could be barred for this reason alone* * * *" (Emphasis supplied.) Not only did Scott's employer *not* warn him that a refusal to answer would be a violation of the "morals clause" of his contract but he actively *encouraged* Scott to challenge the Committee.[2] The employer only

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[2]Q. Do you recall a discussion at which you stated to Mr. Scott that his job was safe, and that the studio could not inquire into political ideas of employees, that the only matter was the ability and work of the employees and not their political associations? A. [By Dore Shary, executive vice-president of RKO, R. 688.] I do. [R. 691.]

Q. Now, Mr. Shary, don't you remember that the only thing you said to Mr. Scott was you wanted him to refrain from being

"discovered" Scott's asserted breach of contract weeks after his appearance in Washington and after "a great deal of pressure being put on the industry." [R. 705.]

Conclusion.

The cruel period of outlawing those who tried unsuccessfully to challenge the powers of the UnAmerican Activities Committee should be brought to an end.

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loud and you wanted him to refrain from being boisterous while on the stand? A. That is right. * * *

Q. And you know, do you not—you heard Mr. Scott's testimony, didn't you, in Washington? A. Yes.

Q. He wasn't loud, was he? A. No.

Q. He wasn't boisterous, was he? A. No. [R. 699-700.]

* * * * * * * * *

A. Scott at one time did ask specifically whether I thought that his job was in danger. I told him that I thought there was a great deal of pressure being put on the industry and upon many of the companies.

I told him what my personal stand was on that problem. [R. 705.]

Q. What was that? A. My personal stand, as I said before was exactly the stand I had taken in Washington, that I would have to say that a man's employment should be based on his ability to write. I did tell him, however, that I was aware of the pressures on the industry in terms of public opinion, pressure groups, and I said that this pressure might result in trouble and I didn't know what form that trouble would take. But I told him again what my personal stand on that would be. [R. 705-706.]

* * * * * * * * *

A. I said this, and I said it to many people, that if there was an issue at stake, I thought the witnesses should have gone on the stand and said very quietly, and with respect to the Committee, that they didn't think the Committee had the right to ask such a question, and then leave the stand, call a meeting with the press, tell the press whether or not they were Communists, that they were not afraid to say that, but say the reason they had not answered the question was to find out whether or not there was a constitutional challenge in the act they had taken.

Q. This conversation with Scott took place after the hearings? A. That's right, sir. [R. 708-709.]

This is not a simple contract case affecting a single employee and a single employer. The "morals clause" is a standard provision in thousands of employment contracts. These are now being used to control an employee's political conduct by rendering unemployable the politically unorthodox.

Petitioner respectfully prays that his petition for rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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The undersigned is one of the counsel for petitioner, Adrian Scott, and has participated in the preparation of the within petition for rehearing. In my judgment this petition is presented in good faith and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court. It is not interposed for delay.

ROBERT W. KENNY.